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In the

Supreme Court of the United States

October Term, 1972

IN RE TERRELL SCHWARZ,

Petitioner.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

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Hereinafter appearing as amicus curiae in the Supreme Court of Illinois for the Board of Managers and the Committee on Grievances of the Chicago Bar Association, sitting as Commissioners of the Supreme Court of Illinois under Illinois Revised Statutes c. 110A § 751 (1967).

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OCTOBER TERM, 1972

No. 72-553

IN RE TERRELL SCHWARZ,

Petitioner,

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

OPINION OF THE COURT BELOW

The opinion of the Supreme Court of Illinois is published in the Illinois Supreme Court reports as 51 Ill. 2d 334, and in the North Eastern Reporter as 282 N.E. 2d 689. It also appears in the Appendix to Petitioner's Brief.

STATEMENT OF THE CASE

The Statement submitted by the Petitioner is sufficient for the presentation of the issues involved.

QUESTIONS PRESENTED

1. Is there an infringement of the Fifth Amendment privilege against self-incrimination where a lawyer has testified in criminal proceedings after a grant of immunity, and that testimony is thereafter used as basis of a professional disciplinary proceeding against him.

2. May a lawyer, when called to respond in disciplinary proceedings, be insulated from the consequences of his unethical conduct by reason of a grant of immunity from criminal prosecution conferred in exchange for his testimony in a criminal proceeding. Did the Supreme Court of Illinois act in an constitutionally impermissible manner when it disciplined Petitioner under these circumstances.

REASONS FOR NOT GRANTING THE WRIT

Prefatory Statement

It is respectfully suggested that the issues presented here are essentially narrow. Clearly, disciplinary proceedings against lawyers charged with unprofessional conduct must be conducted in accordance with substantive and procedural due process requirements; consequently, general discussions of these matters would appear to be of no assistance in directing attention to the basically limited questions involved. We will accordingly not treat in detail those general matters which appear to be essentially extraneous to the issues.

I

THE COURT BELOW DID NOT DEPRIVE PETITIONER OF ANY CONSTITUTIONAL RIGHTS AND ITS DECISION IS CONSONANT WITH THE DECISIONS OF THIS COURT ON COMPARABLE MATTERS.

Petitioner was disbarred by the Supreme Court of Illinois for conduct inconsistent with the ethical standards of the

profession. The disbarment order was based upon Petitioner's own testimony at a criminal proceeding in the Circuit Court of Cook County, Illinois, against a former judge of that Court. Petitioner's testimony, the relevant portion of which appears in Petitioner's brief, was given after the entry of a state court order conferring a grant of immunity. The testimony documented a number of instances where Petitioner had engaged in judicial bribery. Under the terms of the operative Illinois immunity statute, Petitioner was granted immunity from any State or Federal criminal prosecution that might arise out of the use of his testimony.

Chapter 38 of the Illinois Revised Statutes provides as follows:

> "Sec. 106-1. *Granting of Immunity.* In any investigation before a Grand Jury, or trial in any court of record, the court on motion of the State may order that any material witness be released from all liability to be prosecuted or punished on account of any testimony or other evidence he may be required to produce.
>
> Sec. 106-2. *Effect of Immunity.* Such order of immunity shall forever be a bar to prosecution against the witness for any offense shown in whole or in part by such testimony or other evidence except for perjury committed in the giving of such testimony."

In accord with the terms of the grant of immunity, Petitioner has not been criminally prosecuted for the offenses revealed in the course of his testimony at the Kizas trial. Petitioner contends, however, that since he was disbarred by reason of that testimony, the immunity granted him was not co-extensive with his Fifth Amendment privilege of silence, since it failed to protect him from any and all ancillary consequences of his testimony. Petitioner accordingly here contends that his disbarment by the Supreme Court of Illinois was unlawful and constitutionally impermissible.

Petitioner's argument is essentially bottomed on a broad interpretation of this Court's decision in *Spevack* v. *Klein*, 385 U.S. 511 (1967). However, when *Spevack* is properly narrowed to its precise holding and the facts underlying that case are compared to the facts in the instant case, it becomes apparent that Petitioner's broad interpretation does not serve.

Carefully read, it is clear that *Spevack* stands only for the proposition that an attorney may not be disbarred *solely* for asserting his Fifth Amendment privilege against self-incrimination in a disciplinary proceeding. Specifically, *Spevack* does *not* hold that the Fifth Amendment privilege is always available to an attorney in a disciplinary proceeding, regardless of circumstances, nor does it hold that disciplinary proceedings are to be generally considered, for constitutional purposes, as criminal proceedings. To argue either assertion, or both, as Petitioner does here before this Court is to misread *Spevack*, and to selectively ignore subsequent decisions and actions of this Court relevant to the issues in the case at bar.

The essential thrust of the Fifth Amendment privilege of silence is clear in the language of the Amendment itself:

> "No person shall . . . be compelled in any *criminal* case to be a witness against himself . . . " (emphasis supplied)

Historically, the Fifth Amendment has been one of the chief components of our bulwark of constitutional rights, and it has generally been given a broad interpretation by this Court and by various lower courts of the land in order to accomplish its high purpose. In its interpretive decisions this Court has repeatedly emphasized the Amendment's basic foundation and purpose. A recent example is this Court's decision in *Kastigar* v. *U.S.*, 406 441 (1972):

> "It (the Fifth Amendment privilege) can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; *and it protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to evidence that might be* so used." (emphasis supplied).

The question before the Court in the instant case does not concern the general applicability of the privilege in a variety of legal proceedings as the Petitioner would suggest; that the privilege may be asserted in other than criminal proceedings must be accepted as settled. The question, rather, is whether the privilege may be exercised where there is *no* possibility of criminal prosecution, and where the silence of the witness runs counter to a legitimate and important public interest. Recent decisions of this Court, it is respectfully suggested, establish that the answer to that question is in the negative.

In *Gardener* v. *Broderick*, 392 U.S. 273 (1967), this Court had for consideration the case of a police officer discharged from his job as a result of refusing to waive his immunity when subpoenaed before a grand jury investigating alleged corruption on the police force. In an opinion by Justice Fortas, the Court held that the officer could not be dismissed *solely* for his refusal to waive immunity. In so holding, however, the Court reiterated the propriety of compelled testimony where immunity from prosecution does exist:

> "Our decisions establish beyond dispute the breadth of the privilege to refuse to respond to questions when the results may be self-incriminatory . . . Answers may be compelled regardless of the privilege if there is immunity from federal and state use of the compelled testimony or its fruits in connection with a criminal prosecution against the person testifying."

Justice Harlan, in his concurring opinion in *Gardener*, and its companion case, *Uniformed Sanitation Men's Association* v. *Commissioner of Sanitation*, 392 U.S. 287, noted with approval that the majority opinions in those cases clarified *Spevack*, and he found in the two decisions

> " . . . a procedural formula whereby . . . public officials may be discharged and lawyers disciplined for refusing to divulge to appropriate authority information pertinent to the faithful performance of their offices."

Subsequent to the *Spevack* decision, the reviewing Court of the State of New York declined to follow the urgings of lawyer-respondents that the decision in *Spevack* should be interpreted as providing broad insulation for lawyers charged with professional misconduct, and this Court tacitly approved by denial of Petition For Certiorari. One such instance, *Ungar* v. *Association of the Bar of the City of New York*, 389 U.S. 1007 (1967), is of particular relevance here due to its striking similarities to the instant case. The original disciplinary action against Ungar was predicated upon testimony given by Ungar before a grand jury following a grant of immunity, and also upon a criminal contempt conviction growing out of testimony in a related proceeding. The testimony before the grand jury established Ungar's involvement in a violation of the conflict-of-interest statute, and an attempt to obstruct justice. After being disbarred, Ungar unsuccessfully sought to appeal to the New York Appeals Court, 18 N.Y. 2d 690, and then petitioned this Court for a Writ of Certiorari. The petition was denied, 385 U.S. 1006, shortly before *Spevack* was announced.

Following the *Spevack* decision, Ungar moved to vacate the order of disbarment on the grounds that *Spevack* established that the term "criminal case" as used in the Fifth Amendment encompasses any governmental act which in any sense "punishes" or affects an individual adversely,

including a disciplinary proceeding. He further contended, as petitioner Schwarz does here, that since the testimony he had given before the Grand Jury had been compelled by a grant of immunity, he had thereby been immunized from discipline for any illegal conduct disclosed in his testimony.

The Appellate Division, First Department, the New York Court having jurisdiction in disciplinary matters, denied Ungar's Motion to Vacate, holding squarely that a disciplinary proceeding was not a criminal case, and that, consequently, the grant of immunity by the Grand Jury could not immunize him from discipline. (282 N.Y.S. 2d 158) The New York Appeals Court denied Ungar's Motion for leave to appeal from the lower court's decision, and his petition for certiorari to the Supreme Court of the U.S. was denied, 389 U.S. 1007. See also, *Zuckerman vs. Greason,* 20 N.Y. 2d 430, 231 N.E. 2d 718 (Ct. of App. 1967), cert. den. 390 U. S. 925 (1968).

A somewhat comparable question was also presented to this Court in *In The Matter of Nathan Shavin, an Attorney,* Certiorari denied in 393 U.S. 1019. Shavin was suspended from the practice of law by the Illinois Supreme Court as the result of his conviction of the Federal crime of income tax evasion; *In re Shavin,* 239 N.E. 2d 790. In his Petition for a Writ of Certiorari he argued to this Court that *Spevack* had established that a disciplinary action against a lawyer was a "criminal" proceeding. On this premise he further argued that he had not been afforded the protection of the double jeopardy clause of the Fifth Amendment since both the income tax prosecution and the disciplinary proceeding were based on the same alleged acts of misconduct. This Court, as it had in Ungar, denied certiorari.

Another case of particular relevance is *Napolitano* v. *Ward,* 457 F. 2d 279, (7th Cir. Ill.), affirming 317 F. Supp. 83. Richard Napolitano, a former judge of the Circuit Court

of Cook County, Illinois, was dismissed from his office upon the basis of testimony given to a grand jury concerning corrupt business practices at the State Fair. His testimony, compelled by a grant of immunity, detailed his involvement in such practices, and he was later named as a non-indicted co-conspirator in the criminal proceedings that followed the grand jury investigation. After his dismissal from the bench in a proceeding before the Illinois Courts' Commission, Napolitano unsuccessfully appealed for reinstatement to the Illinois Supreme Court, and then appealed to this Court. In that appeal Napolitano filed a "Jurisdictional Statement" detailing the proceedings before the Courts' Commission which resulted in his removal from office, and, inter alia, he argued, as Petitioner does here, that the introduction at the disciplinary hearing of his immunized grand jury testimony had violated his Fifth Amendment privilege against self-incrimination. This Court dismissed the appeal, (*In the Matter of Napolitano,* 401 U.S. 951), for want of a substantial Federal question. (Justice Brennan would have dismissed the appeal for want of jurisdiction).

It should be noted that Napolitano's case is again pending on appeal to this Court, (No. 71-6148), this time on Petition For a Writ of Certiorari, seeking review of the decision in 457 F. 2d 279, supra.

II

THERE IS NO CONSTITUTIONAL REQUIREMENT THAT AN IMMUNITY STATUTE AFFORD BROADER PROTECTION THAN THAT PROVIDED BY THE FIFTH AMENDMENT.

Petitioner's contention that the use of his immunized testimony in a disciplinary hearing rendered unconstitutional the statute under which the immunity was granted cannot be sustained. In *Kastigar* v. *U.S.,* 406 U.S., 441, this

Court examined a California immunity statute with regard to its constitutionality and found that

> "This statute's explicit proscription of the use in any criminal case of testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) is consonant with Fifth Amendment standards."

The Illinois statute by which Petitioner was granted immunity in exchange for his testimony likewise explicitly proscribed use of that testimony in any . . . "prosecutions against the witness for any offense shown in whole or part by such testimony or other evidence . . ." (Ill. Rev. Stat. Chapt. 38, Sec. 106-2). As previously noted, no *prosecution* against Petitioner arose out of the use of his testimony, and thus both the spirit and the letter of the law were duly recognized and faithfully fulfilled. The major point in Petitioner's argument here is, in essence, a matter of semantics involving the definition of the word punishment.

Petitioner has used a page of his brief to list cases in which the Supreme Court of Illinois has used the word "punishment" in connection with the measure of discipline being imposed upon an errant lawyer. However, as the Supreme Court of Illinois pointed out in the decision below, referring to the immunity act in question (Appendix 3a):

> "Section 106-2, however, makes it clear that the effect of an immunity order is limited to criminal prosecutions and *criminal* punishments (emphasis supplied).

Long ago the Illinois Supreme Court clearly defined the essential character and purpose of professional disciplinary proceedings when it said, in *People* v. *Meyerovitz*, 278 Ill. 356, 364 (1917) that

> "The disbarment of an attorney is not punishment for crime nor for the purpose of enforcing remedies be-

> tween parties but to remove a person shown to be unfit for the discharge of the duties of the office and to protect the courts and the public. . . . When he commits an act, whether in the discharge of his duties or not, which shows such want of professional or personal honesty as renders him unworthy of public confidence it affords sufficient ground for his disbarment. It is not necessary that his misconduct should subject him to indictment, or that, if the misconduct charged amount to a crime, he should be prosecuted and convicted before disbarment. . . . A good moral character is essential to admission to the bar, and it must follow that if, after an attorney's admission, it is shown that he has forfeited or does not possess such good moral character, it is the duty of the court to revoke the authority it gave him by his admission to the bar."

In the fairly recent case of *In re Damisch*, 38 Ill. 2d 196 (230 N.E. 2d 254) the Illinois Supreme Court was asked, on the basis of *Spevack*, to alter its above-expressed view that a disciplinary proceeding is not a punishment for a crime. The Court declined to so construe *Spevack* and said that

> "Nothing in Spevack (*Spevack* v. *Klein*, 385 U.S. 511, 17 L Ed 574, 87 Sup. C. 625) has affected the continuing validity of the rule which has heretofore been adhered to in this state; a disciplinary proceeding is not a criminal prosecution and is not subject to all the rules that govern such a case. E.g. *In re Anderson*, 370 Ill. 515, 522; *In re Needham*, 364 Ill. 65, 68."

Section 106-1 read together with Section 106-2 (Chp. 38, Ill. Rev. Statutes, supra), makes it readily apparent that the immunity provided for in the statute protects against prosecution . . . "for any offense . . ." and criminal penalties resulting therefrom. Disciplinary proceedings against an attorney, instituted by the State in order to inquire into the continuing fitness of that attorney to practice law, cannot be properly construed as a criminal prosecution. Nor can

disbarment, a measure taken against an attorney in support of the undeniable public interest in maintaining high ethical standards in the legal profession, be considered a criminal penalty.

In *Reisa* v. *United States*, 364 U.S. 507 (1960), Justice Brennan wrote

> "The complete answer to this (the petitioner's argument that immunity granted him was not co-extensive with his Fifth Amendment privilege) is that in safeguarding him against future federal and state prosecution, 'for or on account of any transaction, matter or thing concerning which he is compelled' to testify, the statute grants him immunity fully coextensive with the constitutional privilege. Some language in *Brown* v. *Walker*, 161 U.S. 601 (1896) . . . compares immunity statutes to the traditional declarations of amnesty or pardon. But neither in that opinion or elsewhere is it suggested that immunity statutes, to escape invalidity under the Fifth Amendment, need do more than protect a witness from future prosecution."

We suggest that, in effect, petitioner Schwarz is asking for something akin to a declaration of amnesty, a generalized pardon that neither the statute in question nor the Fifth Amendment provides for or requires. By disbarring the petitioner, the State of Illinois did not in any way transgress his constitutional rights. The practice of law is a privilege, not a right, and insofar as it constitutes a privilege it demands of the lawyer a higher standard of conduct and duty than that required of an ordinary citizen.

As this Court set forth in *In re Isserman*, 345 U.S. 286-289 (1953)

> "There is no vested right in an individual to practice law. Rather there is a right in the Court to protect itself, and hence society, as an instrument of justice."

CONCLUSION

It is respectfully submitted that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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Heretofore appearing as amicus curiae in the Supreme Court of Illinois for the Board of Managers and the Committee on Grievances of the Chicago Bar Association, Sitting as Commissioners of the Supreme Court of Illinois under Illinois Revised Statutes c. 110A § 751 (1967).